NO. 91-860

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF COMMERCE; *et al.*,
Appellants,

v.

THE STATE OF MONTANA; *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF OF THE STATE OF WASHINGTON AS AMICUS IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

Article I, section 2, clause 3 of the United States Constitution provides that representatives in the United States House of Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." Section 2 of the Fourteenth Amendment reiterates that requirement. The questions presented by this case are:

1. Whether Congress's choice among alternative means of apportioning representatives that are rationally tied to the respective populations of the states is subject to review by a court.

2. Whether 2 U.S.C. 2a, which provides for apportionment of representatives on the basis of the mathematical formula known as the "method of equal proportions," satisfies the requirement that representatives be apportioned among the states "according to their respective Numbers."

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INTERESTS OF AMICUS

The State of Washington's population grew between 1980 and 1990 by a percentage exceeding that of the country as a whole (and exceeding that of Montana). As a direct consequence of those population changes, Washington has gained one seat in the House of Representatives. Montana has lost one. The exact "quotas" for those states (the states'

percentage of national population times 435 House seats) were Washington 8.538, Montana 1.404.[1] Montana seeks by this litigation to transfer a Washington seat to Montana. The decision below, while not ordering that result, would have that effect if retroactively implemented.[2]

The "Washington Paradox"

The decision of the court below, if retroactively implemented by taking a representative from Washington and giving it to Montana, would create a "Washington Paradox"; a state with a .404 fractional remainder would receive an extra representative while a state with a .538 would receive one fewer.[3] This contradicts the result under every system of apportionment approved by Congress since the United States Constitution was ratified.

Such a result arguably contradicts the text of the Constitution which apportions to states "according to their respective numbers." Such a result is also contrary to the intent of the Framers of the Constitution, to the extent such intent may be derived from their comments (*infra*, pp. 21-23) and from the apportionment method adopted by those members of the early Congress who had participated in the Constitution's creation and ratification.

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[1]Given these population trends, by the time this case is decided, Washington's claim will actually be relatively better than even those figures established.

[2]The decision of the two Montana district judges (J.S., pp. 1a-19a) makes clear its preference of the Dean method of apportionment. The dissenting circuit judge notes the result "Washington State's ninth House seat would be reassigned and added to Montana" (J.S., p. 29a). This result was not asked for in the Complaint. (Mot. Affirm, App. 8.)

[3]Other states may label the paradox differently, *e.g.* Massachusetts with a .532 remainder also has a better claim to the disputed seat than Montana under the Jefferson, Webster and Vinton methods. Under the Hill method, neither get this seat. This indicates the fallacy of two-state pairing as a sole criterion for judging apportionment methodology.

The States' Dilemma; Should They Redistrict?

Montana received all the relief it specifically requested below: a declaration that the apportionment statute is unconstitutional and a prospective injunction against the United States implementing it.

Montana now suggests "the only way to give effect to the plain language of the court's findings is to void the certificates of entitlement issued in January 1991" (Mot. Affirm, p. 16, n.8).

One result of such relief (never pleaded) may be to void the results of congressional redistricting completed by Washington--and most other states--in good faith reliance on the finality of apportionment and Certificate of Entitlement each received. Montana took no action after the preliminary census returns in 1990 were released indicating its loss of one seat. Montana continued to delay after the Census was finally reported (December 26, 1990), after the President's Report was prepared and transmitted to Congress (January 2, 1991), and after a Certificate of Entitlement was transmitted to each state (January 16, 1991). Finally, on May 22, 1991, four plus months after all states received the Certificates, Montana finally filed its Complaint (Mot. Affirm, App. 8). Redistricting processes had long since commenced in most states and been completed in many.

There is no way Washington (or most other states) could lawfully proceed otherwise. Redistricting takes time and elections deadlines limit the time available. Schedules and deadlines are established by constitution, statute, or both. Washington's redistricting deadline is constitutional (Wash. Const. art. 2, § 43, amend. 74). (A summary of states which have completed redistricting is App. A.)

Montana alone bears the responsibility for the delay described above and its potentially disruptive effects. These public consequences are strong equitable considerations weighing against its claim for extraordinary relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

STATEMENT

A. Proceedings

In accordance with the United States Constitution, (art. I, § 2, cl. 3) and statutory requirements (13 U.S.C. § 141a), a census was conducted of the United States as of April 1, 1990. On December 26, 1990 the results were reported to the President as required by the statute. In accordance with statutory requirements (2 U.S.C. § 2a(a)), on January 3, 1991 (the first day of the 102nd Congress), the President transmitted to Congress a report showing the results of the 1990 Census, and the number of representatives to which each state is entitled.

Washington's exact (proportionate to population) share of the 435 United States House seats was 8.538, and Montana's was 1.404.[4] Under the "equal proportions" method mandated by 2 U.S.C. § 2a, the President's Statement reported Washington entitled to nine seats, and Montana to one seat.

On January 16, 1991, the Clerk of the United States House of Representatives transmitted to each state a Certificate of Entitlement to that number of representatives (Montana's Certificate is Mot. Affirm, App. 10; Washington's Certificate is reprinted herein as App. B).

Because the letter of transmittal of that Certificate suggested possible change of the Certificates in the event of census adjustment,[5] Washington filed an action in the United States District Court in Washington (*Washington v. United States Dep't of Commerce*, No. C91-315Z, (D. Wash. filed March 7, 1991)).[6] Washington's action sought a declaration and injunction barring the Clerk from revoking or modifying its Certificate. It was argued that neither Constitution nor statute give the Clerk authority to change any state's Certificate.[7] (This argument, as relevant to the instant action, is summarized, *infra*, pp. 12-16). The action is still pending.[8]

Three and one-half months later (May 22, 1991) Montana filed this suit. Washington filed a Motion to Appear Amicus specifically noting that Washington declined to waive its immunity to suit.

A three-judge district court was convened, composed of two Montana district court judges and one circuit court judge.

The State of Washington later filed an Amicus Brief in Support of the Executive Branch Defendants' Motion to Dismiss in which it was argued that Washington (or any state from which Montana sought to take a representative), was an indispensable party, and that the Certificates of Entitlement to United States House seats already issued were irrevocable.

B. State Redistricting Processes

The Certificate of Entitlement to nine United States House seats was duly received by Washington's Governor, and transmitted to the Washington Redistricting Commission established by Washington Constitution, article 2, section 43, amendment 74.

The Redistricting Commission, as required by the Washington Constitution and relevant statute (Wash. Rev. Code § 44.05 (1984)) conducted extensive hearings around the state and redistricted Washington into the nine United States House districts (and intertwined state legislative

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[4]If calculated today, annual census reports confirm that Washington's advantage would be greater.

[5]Other litigation demanding adjustment of the Census figures was, and is, pending in district court, *e.g.*, *New York v. United States Department of Commerce*, 713 F. Supp. 48 (1989) (preliminary rulings reported).

[6]All states were served with the pleadings.

[7]The same action sought to enjoin the Census Bureau from "adjustment" of the Census. When the United States Department of Commerce decided not to adjust (56 Fed. Reg. 33, 582 (1991)), that part of the action was nonsuited.

[8]The Clerk has entered into a stipulation to abide by the decision of that court.

districts). The Redistricting Plan was completed, filed January 1, 1992 and is now final.[9]

Washington is not the only state which has completed redistricting. By the date this case is to be argued, 29 states will have completed redistricting to implement reapportionment under the statute alleged unconstitutional herein (App. A).

Ironically, Montana has not congressionally redistricted. If it prevailed, Montana would be faced with the choice of conducting elections at large, or under an unconstitutional apportionment (the present population of Montana's districts drawn in 1981 are 417,172 and 381,894). They do not meet applicable standards for congressional districts within a state.[10]

SUMMARY OF ARGUMENT

I. THE TIME HAS LONG PASSED TO CHALLENGE THE ACTIONS OF THE PRESIDENT AND CONGRESS IN THE 1990-91 APPORTIONMENT.

Such a challenge now violates the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210 (1962). The very structure of the Constitution, by including apportionment in article II shows this separation of powers. *INS v. Chadla*, 462 U.S. 919, 946 (1983).

Selection of a method to provide for fractional remainders in apportioning representatives among the several states is a congressional function "irresistibly flowing" from article I, section 2. *Prigg v. Penn*, 41 U.S. 6109 (1842). The question, then, is a nonjusticiable political question. *Baker*, 369 U.S. at 210.

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[9]Subject only to legislative amendment before February 12, 1992, which requires two-thirds vote of each House. Wash. Rev. Code 44.05.100.

[10]Montana's filing date for Congress is in March of 1992 (75 days before the primary), (Mont. Code Ann. § 13-10-201(6) (1987)). The primary is in June (Mont. Code Ann. § 13-10-401, *citing* 13-1-107 (1987)).

The action is time-barred, the process was completed, the President has reported each state's proper apportionment, and irrevocable Certificates of Entitlement to those United States House positions have been issued to all states by the Clerk before the commencement of this action.

Any state whose House seat is to be taken by Montana is an indispensible party, yet no state was joined. The burden to do so is on Montana, and the case should be dismissed on that basis alone. *Martin v. Wilks*, 490 U.S. 755 (1989).

II. IF CONSIDERED ON THE MERITS, 2 U.S.C. § 2A IS CONSTITUTIONAL:

If the appropriate constitutional standards are applied, Congress's selection of the "equal proportions" method must be upheld. Interstate reapportionment under article I, section 2, clause 3 is not subject to the same standards as intrastate redistricting under article I, section 2, clause 1. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (distinguished).

Congress has not been shown by Montana to have acted other than in good faith. (*Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983)). The selection of a method before the results are known avoids discrimination or political decision-making based on state impacts.

A. The "equal proportions" method is the best, on mathematical and equitable grounds. It assures that each person's share of a representative is equal. Any transfer of representatives will increase the relative difference between that state's average district size and the ideal, *and* will increase the relative difference between each person's share of a representative.

The method was selected after an objective evaluation of alternatives by the National Academy of Sciences (NAS) and is supported by subsequent analyses.

The "equal proportions" method has numerous advantages over the Dean method when applied long-term (to numerous apportionments). It minimizes *total* variance from

ideal. "Equal proportions" also provides a smaller probability of quota violation and has less of a bias between smaller and larger states than the Dean method.

The Framers intended results such as those Montana challenges. Elsworth spoke of a state which "might have one Representative only, that had inhabitants enough for 1 1/2 * * *" 2 *The Records of the Federal Convention of 1787* at 358 (Farrand ed. 1937). The first apportionment adopted rounded-down fractions, like Montana's.

ARGUMENT

I. THE 1990-91 APPORTIONMENT OF REPRESENTATIVES IS NOT NOW SUBJECT TO REVIEW

The district court dealt only summarily with whether the Complaint dealt with a nonjusticiable political question, and not at all with whether it ought be dismissed because of Montana's delay in filing and failure to join indispensable parties (J.S., 5a). Under all of these grounds, the case ought to have been dismissed. They shall be considered seriatim below.

A. Congress's Selection of a Method to Provide For Fractional Remainders in Apportioning Representatives Among the Several States Under Article I, Section 2, Clause 3 Is a Political Question

Montana and its congressional representatives filed this action instead of asking Congress to change the method of apportionment. Indeed, Montana's congressional representatives have never even filed a bill in Congress to change the apportionment method.[11]

[11]Ironically, both Montana congressmen opposed change of the equal proportions method when last considered by Congress (quoted and cited *infra*, p. 10, 11).

In order to get the additional United States House seat through court action, Montana must not only have the court void an act of Congress but also compel the adoption of a statute encompassing an apportionment method more favorable to Montana. The Court must also void the House Clerk's Certificates of Entitlement (presumably those of all states). Montana now suggests this drastic remedy is appropriate (Mot. Affirm, p. 16, n.8).

Then, to get Montana the extra House seat, the President (a nonparty) must be ordered to make a new report to Congress providing two House seats for Montana.[12] Finally, the House Clerk must be ordered to issue (all) new Certificates of Entitlement with at least Montana's and Washington's entitlement changed.

Each of these steps involves reversing actions of the separate branches of government, which have long become final. The case clearly involves nonjusticiable political question(s).

This Court has said that:

> In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.
>
> The nonjusticiability of a political question is primarily a function of the separation of powers.

Baker v. Carr, 369 U.S. 186, 210 (1962) (cite omitted).

Washington (and other states) have already concluded their congressional redistricting, in reliance upon the finality of the actions of both the Executive Branch and the Legislative Branch.

The final actions of the Executive Branch were two: First, the Secretary of Commerce made its final report of the Census results on December 26, 1990 (13 U.S.C. § 141(b)).

[12]Because Washington's population is growing faster than Montana's, by the time the report is made, a current report would probably dispense with Montana's claim.

Then, the President certified the final apportionment results of the 1990 Census including states' apportionment to the Congress on January 3, 1991 (the first day of the 102nd Congress) (2 U.S.C. § 2a).

The Legislative Branch has also taken its final action. The Clerk of the House sent each state its Certificate of Entitlement on January 16, 1991 (2 U.S.C. § 2b). On their face, and by statute, these Certificates are final until the next decennial census and apportionment.

At another level, the finality in question is the act of Congress selecting an apportionment method (2 U.S.C. § 2a). While arguably subject to challenge either in Congress or the courts, *between* census/apportionments, the statutory scheme should be considered final during each census/apportionment. The advantages of having a final congressionally-adopted apportionment formula in place *before* the political effects of census changes were apparent has long been recognized. This was one of the reasons for adoption of the statute:

> Heaven knows, out of the American experience, that rules have got to be hard and fast if constitutional nullification in a large sense is to be prevented in connection with the reapportionment of the House of Representatives.

(87 Cong. Rec. 8053 (1941)) (Statement of Senator Arthur Vandenberg). He has been referred to as "the champion of permanent legislation" (M. Balinski & H.P. Young, *Fair Representation*, 58 (1982)).

When Congress considered the statute in 1980[13] both Montana congressmen (plaintiffs below) testified in opposition to changing the method once the results of a census are known.

> I think it is entirely inappropriate, however, to adopt a new formula after the census facts are known * * * so that we are not, rightfully, accused of adopting a formula to fit the facts.

[13]This was years after *Wesberry* and most of the cases that Montana claims establish the unconstitutionality of this statute. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Census Activities and the Decennial Census: Hearing on HR 1990 Before the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, 97th Cong., 1st Sess. (1981) p. 13 (Statement of Representative Williams).

> What we have here is a situation where the ball game has been played under a prescribed set of rules; someone has lost, and now they want to change the rules * * * we will no longer have a situation where Congress can act free from political considerations and in the national interest.

Id. at p. 11 (Statement of Representative Marlenee).

The "dominant consideration" of attributing finality to actions of the separate branches argues in favor of finding the question "political" and nonjusticiable. In this interstate apportionment, the separation of powers is keenly implicated, since orders directed to both branches would be necessary to provide the desired remedy.

Baker, and later cases, have noted that a challenge to (intra) state redistricting did not implicate the separation of federal powers because that doctrine concerns: "the relationship between the judiciary and the coordinate branches of the Federal Government, * * *" *Baker*, 369 U.S. at 210. This case involves both the federal judiciary/executive and federal judiciary/legislative relationship: These questions are "essentially a function of separation of powers." *Baker*, 369 U.S. at 217.

It will be noted below that there are "policy choices and value determinations" tied to the selection of apportionment method which are "constitutionally committed for resolution to the halls of Congress." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Such political cases are not appropriate for judicial resolution.

A last observation of *Baker* is also relevant to the finality argument. "The political question doctrine, [is] a tool for maintenance of government order, [and] will not be so applied as to promote only disorder." *Baker*, 369 U.S. at 215.

The fact that states have already redistricted, creating congressional districts intertwined with legislative and local districts, raises additional issues of federalism and whether states may rely on the results of congressional and executive process. In Washington and other states, a change at this late date would disrupt the political process, probably making it impossible to conduct 1992 elections in accordance with statutory deadlines.

B. Washington's Entitlement May Not Be Revoked

1. The Clerk Does Not Have Authority to Revoke Washington's Certificate of Entitlement

Montana now suggests the appropriate remedy "is to void the certificates of entitlement issued in January 1991" (Mot. Affirm, p. 16, n.8).[14]

However, the Clerk does not have statutory or other authority, to revoke or modify the Certificate of Entitlement of Washington or other states.

2 U.S.C. § 2a(b) provides that the Clerk *shall* issue a Certificate within 15 days after receiving apportionment figures from the President, and does not provide, explicitly or otherwise, for the revocation or modification of a Certificate once it has been issued.

The word "shall" in a statute is mandatory language. *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987); *Bergen v. Spaulding*, 881 F.2d 719, 721 (9th Cir. 1989).

The statute even goes on to specify who "shall" perform this duty if the Clerk does not:

> In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

2 U.S.C. § 2a(b).

[14]The Complaint did not pray for such relief (Mot. Affirm, App. 8).

This Court has held the interpretation of a statute must begin with the statute's language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580 (1981). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

The plain language of 2 U.S.C. §§ 2a and 2b indicate that the Clerk must issue Certificates in accordance with the President's Statement and has no authority to revoke or modify an issued Certificate.

The legislative history of the statute, discussed below, confirms that the Clerk cannot, without explicit statutory authority, revoke or modify the Certificate.

2 U.S.C. §§ 2a and 2b provide that each state is "entitled" to the number of seats shown in the President's Statement and indicated in its respective Certificate until the taking effect of a subsequent reapportionment. To interpret the statutes to allow the Certificate to be changed would render this entitlement language meaningless. It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). In construing a statute a court is obliged to give effect, if possible, to every word Congress used. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

The vesting of each state's entitlement probably occurs at the time the President's Statement is filed with the Congress; surely it vests when the Certificate is actually issued and received.

Thus, pursuant to 2 U.S.C. §§ 2a and 2b, once the President and Clerk acted, Washington was entitled to nine congressional seats until the next census and apportionment

(in the year 2000). The Clerk has no authority to revoke or modify a Certificate after it has been issued or to issue any certificate varying from the Statement of the President. The Clerk may not be ordered to perform an act he has no authority to perform.

2. Legislative History Confirms That the Certificates of Entitlement Are Irrevocable (Absent Congressional Action)

The legislative history of 2 U.S.C. §§ 2a and 2b confirms that Washington's entitlement is irrevocable, short of explicit direction by an act of Congress. There is only one historical instance in which a state was denied a seat to which it was entitled according to a Certificate. An explicit act of Congress was required to take away the seat.

In 1941, Congress debated amendments to 2 U.S.C. § 2. As required by the statute, as then written, the President had reported the 1940 census results to the Congress in the first week of 1941. He also reported the appropriate reapportionment by the two methods then prescribed by statute ("major fractions" and "equal proportions"). The methods of apportionment resulted in either Arkansas or Michigan getting one House seat. At that time, the statute provided that the method of apportionment used in the previous census should continue to apply unless Congress ordered otherwise within sixty days. The method of major fractions had been followed in the previous reapportionment.

The Senate did not act within sixty days. 87 Cong. Rec. 8053 (1941) (Statement of Senator Vandenberg).

In commenting on this situation, and the effect *if* Congress didn't specifically order a change, Senator Vandenberg stated:

> When the Senate did not act within 60 days, the statute made reapportionment by so- called major fractions final and conclusive and binding upon all concerned. The case was closed; the incident was finished; and the Clerk of the House so notified the States.

87 Cong. Rec. 8053 (1941).

To change that situation, it was recognized that a specific act was required.

Such a retroactive change was bitterly opposed. The debate confirmed the general proposition of our argument here; unless Congress specifically acts, the Certificates are final. A section of the bill directed the Certificates be changed. Senator Brown vigorously objected as follows:

> So I say that the one conclusion we can reach is that while experts disagree as to the fine-spun distinction between these two methods, the effect is to take from Michigan the Representative which under the law it now has and which the Secretary of the Senate has advised the Governor of Michigan it is entitled to. The effect is to add to Arkansas a Representative which by the action of the Clerk of the House of Representatives, under the Constitution, he has already advised Arkansas, some 8 or 10 months ago, she does not have--in other words, that she must elect 6 Representatives in 1942, and Michigan must elect 18. This is an attempt to change existing law, and it is an attempt to change 120 years of history in the make-up of the apportionment of the membership of the House of Representatives between the different States.

87 Cong. Rec. 8078 (1941).

Senator Brown then proposed to amend the bill to apply the change only in 1950, and following apportionments:

> If my amendment should be adopted, the Caraway method of equal proportions would become the law; but it would not be applicable to change retroactively the present apportionment of Representatives between the States of Michigan and Arkansas. It would be effective in 1950.

87 Cong. Rec. 8083 (1941). The amendment was defeated.

Despite Senator Brown's comments, and others, concerning the inequity of retroactively applying the method, Congress voted to make the change in method retroactive and require *new* Certificates to be issued.

Section 2b of the Act of November 15, 1941 provided as follows:

> (b) If before the enactment of this Act a certificate has been sent to the executive of any State under the provisions of such section 22, as in force before the enactment of this Act, the Clerk of the House of Representatives shall, within fifteen calendar days after the date of enactment of this Act, send a new certificate to such executive stating the number of Representatives to which State is entitled under this section.
>
> Approved, November 15, 1941.

Pub. L. No. 87-291, 55 Stat. 761, 762 (1941) (originally codified as 2 U.S.C. § 2b).

The Clerk was to send a *new* Certificate of Entitlement if such a Certificate had been sent prior to November 15, 1941 (as they had). Thus, the new determinations were made, and new Certificates issued (changing only Michigan and Arkansas).

This is the one occasion Congress was confronted with valid Certificates that it wished to change. The avowed purpose was using a fairer method of apportionment ("equal proportions"). Congress passed a statutory amendment to 2 U.S.C. § 2 which specifically ordered the Clerk to issue amended Certificates.

Congress's action in 1941, and the legislative history surrounding it, confirms that a Certificate cannot be revoked or modified by the Clerk unless and until Congress enacts legislation to that effect.

3. There Should Be Finality in Congressional Apportionment

There should be finality in congressional apportionment because it would be harmful and disruptive to permit endless challenges to political authority. Both federal and state courts recognize that there should be finality in political processes, especially procedures relating to elections. *Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987) ("The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies").

Apportionment of congressional seats relates directly to elections, since legislative districts are drawn based on the number of seats awarded to each state. Washington, like many other states, has already expended considerable effort redistricting. To take a seat from Washington now would be disruptive, requiring redistricting efforts to start again, and undermining public confidence in our political process. By the time such efforts could begin, the census figures would have to be updated[15] or would be more out of date than is inevitable under the present process. In the interest of preserving the integrity and finality of the apportionment process, the Clerk should not now be ordered to revoke or modify Washington's Certificate at this late date. These public consequences must surely be considered. By themselves, they justify denying further relief to Montana. *Weinberger*, 456 U.S. at 312.

C. The Action Should Have Been Dismissed Because Washington Is an Indispensable Party

Washington was an indispensable party to this action but could not be joined. Accordingly, the court should have dismissed Plaintiffs' Complaint (Fed. R. Civ. P. 19).

Two separate inquiries should have been conducted. First, are there parties who should be joined, either because their own interests or the interests of the parties might be harmed by their absence? Such parties, referred to as "necessary parties," must be joined if feasible. Fed. R. Civ. P. 19(a).

Second, if a party determined to be necessary under Rule 19(a) cannot be joined, should the action in "equity and good conscience" be dismissed? If the court determines that the action should be dismissed the absent party is labelled "indispensable." Fed. R. Civ. P. 19(b); *Eldredge v. Carpenters*

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[15]The good news: updated figures would probably end Montana's claim since its growth has been relatively low.

46, 662 F.2d 534, 537 (9th Cir. 1981), *cert. denied*, 459 U.S. 917 (1982). The inquiry is a practical one and fact specific. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19 (1968).

Rule 19(a) describes two categories of persons who should be joined.

The first category comprises those parties in whose absence "complete relief cannot be accorded among those already parties."

Complete relief cannot be accorded without Washington in this case because the Executive Branch and Congressional Appellants can not give Montana an additional congressional seat without taking it from Washington or some other state.

The second inquiry required by Rule 19(a) concerns prejudice, either to the absent persons or to those already parties. Rule 19(a)(2)(i) provides that a person should be joined if he claims an interest relating to the subject of the action, and the disposition of the action may "as a practical matter impair or impede [his] ability to protect that interest."

Washington was a necessary party under Rule 19(a)(2) because Washington claims an interest in its congressional seat, and the disposition of this action in Montana's favor may impair or impede Washington's ability to protect its seat. Montana's failure to join Washington also runs a risk of "leav[ing] * * * persons already parties subject to a substantial risk of incurring * * * inconsistent obligations. * * *" *Martin v. Wilks*, 490 U.S. at 764.[16]

Conflicting claims by beneficiaries to a common trust--House membership in this case--present a textbook example of a situation where one party may be severely prejudiced by a decision in the party's absence. *See* J. Moore *et al.*, *3A Moore's Federal Practice*, para. 19.08 at 19-165 (1984)

[16]As noted pp. 4-5, *supra* Washington has pending litigation to enjoin the Clerk from changing its Certificate.

("Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally indispensable.") (quoted in *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986)).

In *Carey v. Klutznick*, 653 F.2d 732 (2nd Cir. 1981), *cert. denied sub nom., Carey v. Baldrige*, 455 U.S. 999 (1982), the court considered whether other states must be joined in a census case in which New York sought adjustment of population figures.

The *Carey* court, 653 F.2d at 736, stated that "House membership is a fund in which fifty States have an interest. No State's share can be increased without adversely affecting at least one other State. * * * The adversely affected States therefore fall within the category of parties who should be joined in the instant litigation if feasible." *Carey*, 653 F.2d at 737.

Since Washington is "necessary" and wasn't joined, the court should have determined whether in "equity and good conscience" the case should be dismissed under Fed. R. Civ. P. 19(b).

Prejudice to any party resulting from a judgment tips the balance towards dismissal of the suit. Washington or some state would be prejudiced if Montana prevails and takes one of Washington's congressional seats.[17] The ability to intervene is not a factor that lessens prejudice if it requires waiver of immunity. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991). Nor is amicus status sufficient to lessen prejudice. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990).

Only if an adequate remedy can be awarded without the absent party may the suit go forward. *Makah*, 910 F.2d at 560; *Wichita*, 788 F.2d at 777; *Idaho ex rel. Evans v. Ore-*

[17]"Rule 19 speaks to *possible* harm, not only to certain harm." (Emphasis in original.) *Aguilar v. Los Angeles Cy.*, 751 F.2d 1089, 1094 (9th Cir. 1985).

gon, 444 U.S. 380 (1980). Although the United States was not indispensable in that case, if either *state* had been absent the case ought to have been dismissed.

No shaping of relief or remedy is possible to lessen prejudice because the relief Montana ultimately seeks is all or nothing--an award of an additional congressional seat, which must necessarily be taken from Washington or another state.[18]

Here, the plaintiffs will have an adequate remedy if the action is dismissed; Montana's exclusive remedy is (was) in Congress.

Since Washington is an indispensable party to this litigation and can not be joined, the court below should have dismissed Appellees' claims.

II. UNDER THE APPROPRIATE CONSTITUTIONAL STANDARD, CONGRESS'S SELECTION OF THE "EQUAL PROPORTIONS" METHOD MUST BE UPHELD.

The history and language of article I, section 2 do provide constitutional standards to apply to congressional reapportionment among the states:

First: No state may be denied a representative: "each state shall have a least one representative." U.S. Const. art. I, § 3.

Secondly, the apportionment must be tied to the population of the states "according to their respective numbers." U.S. Const. art. I, § 2. A correlative test that may be derived from this text (and its history) is that for any pair of states, no state may be assigned more representatives than a state

[18]Montana could, of course, ask the Court to order expansion of the House. As noted (p. 2, n.3 *supra*), this may require more than one addition since other states have a better claim than Montana.

with a population larger than its pair.[19] Arguably, the same treatment of fractional remainders is required (a state with .40 like Montana is constitutionally barred from getting a seat before a state with a higher remainder like Washington or Massachusetts).

Any reapportionment meeting these tests should pass constitutional scrutiny. Clearly, the current "equal proportions" method meets those standards.

The sole issue raised in this litigation is the assignment of representatives to states with fractional remainders. None of the historical formulas considered by Congress have ever resulted in one state getting no representatives, or fewer representatives than a less populous state ("equal proportions" can not do so). Therefore, no apportionment approved by Congress has been unconstitutional.

A case quite close to Montana's was specifically discussed at the Constitutional Convention: "A State might have one Representative only, that had inhabitants enough for 1 1/2 or more, if fractions could be applied. * * *" 2 *The Records of the Federal Convention of 1787*, 358 (Farrand ed. 1937) (statement of Oliver Elsworth).[20] Here Montana (with 1.404) has a lesser claim than Elsworth's fictional state described (1.5 plus).

Issues of fairness and equity, such as quota (n.18, above) are policy questions for Congress. These issues are textually committed to Congress. The power to apportion "irresistibly flows" from Congress's article I, section 2 pow-

[19]A third test of fairness has been proposed since the time of the Constitution; that of meeting "quota" or the "Rule of Three"; a state must receive a share equal to its percentage of the national population times the total number of representatives rounded either up or down to a whole number (M. Balinski & H. P. Young, *Fair Representation* 14 (1982)).

[20]The context was a proposal to tie taxes to the representatives. By the time of this statement, the apportionment issue "Great Compromise," had been resolved (described briefly *infra*, p. 22).

ers. *Prigg v. Penn*, 41 U.S. at 619 . Such issues are excluded from judicial review. *Japan Whaling*, 78 U.S. at 2860.

It will be shown below that "equal proportions" is best if judged by such standards, but they are not constitutionally-derived standards. With specific regard to the issue of "quota," it can be mathematically demonstrated that the Dean method has a higher probability of violating quota than the present "equal proportions" method (*supra*, p. 20).

Article I, section 2, clause 3 of the United States Constitution provides that representatives be apportioned among states according to numbers. The Framers selected numbers rather than wealth or property as the basis for allocating representatives among the states. 1. Farrand, p. 606. It reflected the demand of the large states that representation in one of the two houses be based on size. The primary command of article I, section 2, according to the Framers, is that each large state gets more representatives than every smaller state. "The proportional representation in the first branch was conformable to the national principle & would secure the large States agst. the small." 1. Farrand, p. 468 (Statement of Elsworth).

Franklin described the basis of the Great Compromise:

> If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint.

1. Farrand, p. 488. Article I, section 2 was intended to meet the demand of the large states for a population-derived House and thereby induce them to join the "broad table."

The fraction problem inherent in congressional apportionment has no single solution--Congress has handled it for 200 years without judicial interference. The Framers ignored the problem in focusing on the issue of balancing between large and small states (1. Farrand, pp. 559-561, 602). So also did the first Congress, by selecting a round number of population per representative, and utilizing the Jefferson method to apportion between states until 1842.[21]

The choice of method to deal with fractional remainders is determined by Congress's selection of the goal. It requires choosing between intricate, somewhat incomprehensible (to the layman) mathematical models and formulae.

This litigation can and should be resolved without resorting to square roots, harmonic means and major fractions; without the Dean, Hill, Webster, and Vinton methods. Very simply, this Court need only recognize that no constitutional principle is implicated in Congress's choice of a solution to the fractional remainder problem (so long as the constitutional imperatives discussed above are satisfied).

A. *Wesberry* Tests Do Not Apply to Congressional Reapportionment of Representatives Among the Several States

The district court concluded that article I, section 2 "provides no textual basis upon which to distinguish the duties of Congress from the duties of state legislatures." (J.S., 9a-10a)

This conclusion is flawed, however. *Wesberry* dealt with clause *1* of article I, section 2; Apportionment among the states deals with article I, section 2, clause *3*.

Not only does the Constitution not mandate application of *Wesberry's* one man one vote principle in apportioning between the states, it forbids it in requiring "each state shall have at least one representative," no matter how small its population, *and* in requiring apportionment "among the

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[21] Act of Apr. 14, 1792, 1 Stat. 253 (one representative per 33,000 persons); Act of June 14, 1802, 2 Stat. 128 (33,000); Act of Dec. 21, 1811, 2 Stat. 669 (35,000); Act of Mar. 7, 1822, 3 Stat. 651 (40,000); Act of May 22, 1832, 4 Stat. 516 (47,700). (J.S., p. 5, n.5.)

several states," which inevitably raises the fractional remainder problem to be dealt with by Congress.[22]

The first and all early Congresses dealt with the problem by disregarding it, using the Jefferson method, which discards fractional remainders. That this was not violative of any constitutional mandate is confirmed by the provision of a statistical method to calculate *states'* representation by setting a fixed (round number) of population per representative; "one representative for every thirty thousand." Fractional remainders were inevitable in such a calculation method.

The court cites Wilson comments to the contrary (J.S., 10a). His discussion was part of the early debate over whether representation would be per state (as in the Articles of Confederation) or related to population. Wilson surely was not advocating any one man one vote precise *Wesberry* standard for interstate apportionment in 1790. None of the founders ever advocated such a standard, either at the Convention, or later in Congress. As noted in the Elsworth statement quoted above (p. 22), the contrary result was anticipated; a state like Montana, even with a population equal to 1.5 representatives would get only one.

1. Congress Acted in Good Faith in Selecting "Equal Proportions"

Assuming arguendo that the *Wesberry* analysis is applicable by analogy to this case, the first burden is on the challenger. Montana must show "that the population differences were not the result of a good-faith effort to achieve equality." *Karcher,* 462 U.S. at 730, 731.

In defense, the appropriate measure of equality to be applied and whether the apportionment meets it "as nearly as is practicable" then must be shown. *Wells v. Rockefeller,* 394 U.S. 542, 544 (1969).

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[22]If state borders could be disregarded, there would be no problem.

Washington vigorously disputes that Montana has shown Congress to have acted in bad faith--or failed to act in good faith. The "equal proportions" method was chosen after 150 years of experimentation and consideration of alternate apportionments, and implemented as recommended by a non-partisan National Academy of Sciences committee (NAS) and the vast weight of scholarly analysis. It can not be suggested that the method was selected to discriminate against, or prejudice Montana, or its various plaintiff representatives in this action since it was selected with no idea of the impact on Montana.

If this Court determines that it (or a federal court) rather than Congress ought select the method of apportionment for the United States House, the recommendations of the NAS justification for its application, argue strongly in favor of the method of "equal proportions" as meeting equitable requirements "as nearly as is practicable."

B. "Equal Proportions" Is the Best Method of Reapportionment for Congress[23]

1. Historical Scientific Support for "Equal Proportions"

On several occasions, Congress has relied upon the expertise and objectivity of NAS to advise on the best formula to apportion. On each occasion NAS concluded the "equal proportions" method was superior. NAS' first report concluded "it [equal proportions] occupies mathematically a neutral position with respect to emphasis on larger and smaller states." (*Report of NAS, Fiscal Year, 1928-29*, pp. 20-23, quoted in Ernst Decl. J.A. 24). In 1948, a NAS report concurred with the earlier conclusions (Morse, *Report to the President of the National Academy of Sciences* (1948)).

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[23]The label is a conclusion from *Congressional Reapportionment,* a 1929 article in 42 Harv. L. Rev. 1014 at 1020.

The "equal proportions" method had actually been publicly debated, analyzed and compared with alternatives for several years preceding the 1929 report.

One earlier analysis compared "equal proportions" and each of the other viable alternatives (including "harmonic means" or the Dean method) and concluded "both mathematical and political reasons point to the Method of Equal Proportions as the best plan for a just apportionment." 42 Harv. L. Rev. at 1047.[24]

In 1970, a House committee recommended retention of the "equal proportions" method. H.R. Rep. No. 1314, 91st Cong. 2d Sess. (1970).

In 1981, congressional testimony considered eight different alternatives (e.g. testimony of Leon Gilford before House Post Office and Civil Service Committee, Sub-Committee on Census and Population June 11, 1981 at p. 69 lists the eight). No change from "equal proportions" was recommended. This was after *Wesberry* and most of the cases Montana relied upon.

2. Advantages of "Equal Proportions" Over The Dean Method

The lower court's preferred method, the Dean method, has numerous severe disadvantages compared with "equal proportions." Among them, the Dean method does not (and is not intended to) minimize differences in each person's share of a representative (Ernst Decl. J.A., p. 8). This test, to minimize differences in each person's share of a representative:

> [I]s a better test of 'one person one vote' for districts between states since it measures the portion of a vote (member) to which a person is entitled in the House
> * * *

[24]Mathematical treatises and articles during the same period evaluating the methods and concluding that equal proportions was the most equitable methodology are listed in *Fair Representation*, p. 182, nn. 13, 14, 16, 19, 21.

Ernst Decl., J.A. p. 26.

In arriving at a contrary decision, the district court accepted and relied upon the findings of one affiant. (*See* citations to "Tiahrt" (J.S., p. 13a)). His testimony is contrary to that of the other witnesses (and to the weight of prior mathematical analysis *e.g.*, n.22). The dissent accurately notes he was quite wrong on at least one assertion; his claim that "the Dean method produces the smallest variance or standard deviation." Tiahrt Affidavit, (Mot. Affirm, App. 15). It was pointed out by countering affidavit, and later conceded by Montana (J.S., p. 31a), that the "equal proportions" (Hill method) formula produces the least variance.[25]

When all states are considered, "equal proportions" is far superior (total variance 661,320,400 with, "equal proportions"; 681,742,400, with the Dean method). (Ernst Decl., J.A., p. 29.)

Not only was (is) this result true for the 1990-91 census, but "it can be shown mathematically that the 'equal proportions' method minimizes this (total) variance among all apportionment methods and all sets of populations." (Ernst Decl., J.A., p. 30.)

Even the variance total between the two states of Washington and Montana is less under "equal proportions" (495,438). Under the Dean method it is 649,492. This is only a two state comparison, of course.

The dissent also noted the inequitable application in this case of the Dean method. Under the present allocation a Washington resident has a share of a representative 48% larger than a Montana resident (and a Montana district is 48% larger than Washington). With the Dean method, and a transfer of one seat, Washington's districts become 52.1% larger than Montana's (and the share of a representative 52.1% less) (J.S., p. 29a).

[25]Summary judgment may have been inappropriate, to the extent the court viewed any of Montana's expert's assertions as "facts" they were contested. His vitae indicates he has no prior expertise in the area of elections or census statistical analysis. (Mot. Affirm, App. 16.)

On a higher level of abstraction, the methods have been analyzed for bias ratio[26] (favoring small versus large states) as if they had been applied over the whole of United States history (19 reapportionments, as of 1980). The result is shown in Fair Representation, p. 124 Table A5.1. The Dean method resulted in a 56.6% bias ratio; "equal proportions" (the Hill method) only 54.6% (the smaller score shows less bias).

Such a historical overview is appropriate when considering adopting any method for long-range application.

Although neither system violates "quota" this decade, it is possible to calculate the theoretical probability of violating quota (per 1000 "problems"). The results are Dean method: 15.40; Hill method: 2.86 (Fair Representation, p. 81 Table 10.3). A violation of quota is, arguably, one of the violations of the constitutional constraints (see p. 20, n.18). It is proper that Congress or a court select a method for long-term application that offers the lower probability of such quota violation.

CONCLUSION

For the above reasons, and those set forth in the Brief of the United States, the judgment below must be reversed and the action ordered dismissed.

Dated this 15th day of January, 1992.

Respectfully submitted,

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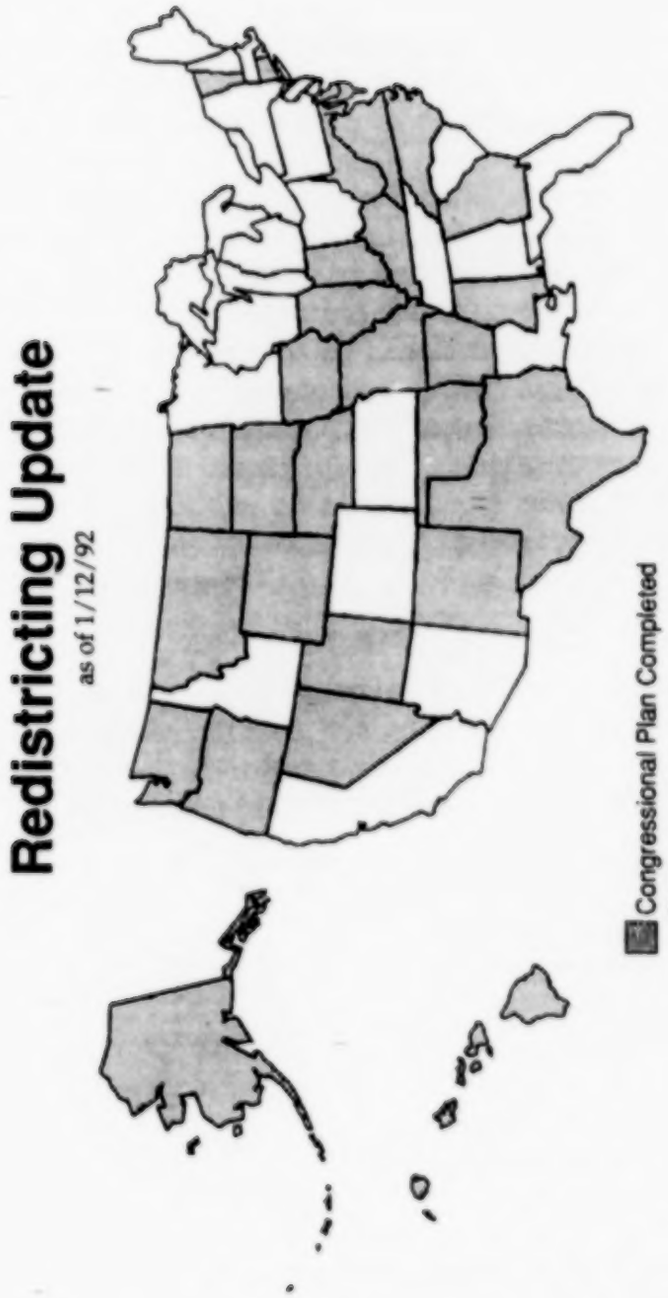
[26]Counting, for each census year, the pairs of states in which smaller states would have been favored and dividing by total pairs.

APPENDIX A



APPENDIX B

Certificate of Entitlement

HOUSE OF REPRESENTATIVES

OFFICE OF THE CLERK
WASHINGTON, D.C.

I, Donnald K. Anderson, Clerk of the House of Representatives of the United States, Hereby Certify, Pursuant to the Provisions of Title 2, United States Code, Section 2a (b), That the State of

WASHINGTON

Shall be Entitled, in the One Hundred Third Congress and in Each Congress Thereafter Until a Subsequent Reapportionment Shall Take Effect Under Applicable Statute, to

NINE REPRESENTATIVES

in the House of Representatives of the Congress of the United States.

In Witness Whereof I Hereto Affix My Name and the Seal of the House of Representatives of the United States of America this Sixteenth Day of January, Anno Domini 1991, in the City of Washington, District of Columbia

Donnald K. Anderson

CLERK OF THE HOUSE OF REPRESENTATIVES
OF THE UNITED STATES